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**Subject: C 1/2004 Italy (Sardinia) – Regional Law nr. 9/98 Corrigendum and extension of the Procedure C 1/2004 pursuant to Article 88(2) of the EC Treaty**

Sir,

The Commission hereby inform you that it has decided, after further investigations, to correct and extend the scope of the pending procedure C 1/2004 pursuant to article 88(2) of the EC Treaty.

## **1 PROCEDURE AND BACKGROUND**

1. On 21 February 2003 the Commission received a complaint, (letter A/31409, registered as CP 15/2003), denouncing the misuse of a regional aid scheme in favour of the hotel industry in Italy - Regione Sardegna, approved by the Commission in 1998 (N272/1998)<sup>1</sup>.
2. By letter dated 26 February 2003 (D/51355) the Commission requested clarification to the Italian authorities. By letter dated 28 March 2003 (D/52060) the Commission accepted to extend the deadline for providing the information. By letter dated 22 April 2003 (A/33012 of 28 April 2003) the Italian authorities provided information to the Commission.

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<sup>1</sup> Regional law n. 9/98  
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3. According to the complainant, under the above mentioned scheme aid has been awarded to investments for which no application for aid had been submitted before work started on the project, in breach of the provisions on national regional aid.
4. The aid scheme N272/98 provided for grants in favour of initial investments in the hotel industry in Italy - Regione Sardegna. It was approved in 1998 and the Commission considered it compatible with the common market on the basis of the derogation of Article 87(3)a.
5. After the adoption of the Commission's decision approving the scheme N 272/98, the Italian authorities approved the implementing regulations of such scheme with different administrative decisions, in particular, decree n. 285/99<sup>2</sup>, *deliberazione* n. 33/4 of 27.7.2000 and *deliberazione* n. 33/6 of 27.07.2000 coexisting with the n. 33/4. Decree n. 285/99 and *deliberazione* n. 33/6 were not brought to the attention of the Commission.
6. According to administrative decisions n. 285/99 and n. 33/6, aid can be awarded, exceptionally and only for the first admission notice of the measure ("bando"), to investments started before the date of application for the aid.
7. Following the information provided by the Italian authorities, it appears that in 2002 aid has been awarded to at least 28 investments projects started before the date of application for the aid, for a total amount of aid between 8 and 16 ml €
8. On 3 February 2004 the Commission adopted the decision of opening the formal investigation procedure<sup>3</sup> "Misuse of aid N 272/98 – Decision to initiate the procedure provided for in Article 88(2) of the EC Treaty".
9. On 26 April 2004 a third party submitted his observations to the decision of opening of procedure. On 30 April 2004 and on 30 June 2005 the Italian authorities submitted their comments on the opening of procedure decision.

## **2 REASONS FOR CORRECTING AND EXTENDING THE PROCEDURE**

10. In its consideration of the aid, the Commission has concentrated its analysis on the fact that two of the above mentioned implementing regulations were never brought to the attention of the Commission. Furthermore, *deliberazione* n. 33/6 is not mentioned at all in the opening decision.
11. It is worth to stress that the at least 28 cases where aid was allegedly awarded in violation of the necessity principle have to be attributed to *deliberazione* n. 33/6 and not to *deliberazione* n. 33/4, which was erroneously mentioned in the opening of procedure decision of 03.02.04. *Deliberazione* n. 33/6 "Transitory rules for the 1° bando" states that exceptionally for the first invitation to submit applications, expenditures for works incurred after 05/04/98, the date of entry into force of the regional law n. 9/98, are eligible for aid.<sup>4</sup>

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<sup>2</sup> Annulled for flaws on 27.07.00 by decision of the Regional Government.

<sup>3</sup> Published on O.J. C 79/2004

<sup>4</sup> Only « *deliberazione* n. 33/4 » was transmitted on 02.11.00 to the Commission services in the context of the appropriate measures procedure following the entry into force of the Guidelines on regional aid 1998.

12. Furthermore, the decision to open the formal investigation procedure considers that we are dealing with an abusive application of an approved aid scheme, in the meaning of Article 16 of the Procedural Regulation<sup>5</sup>. Article 16 is normally understood to refer to situations where the beneficiary of an approved aid applies the aid contrary to the conditions of the individual aid awarding decision or aid contract, and it is not meant to cover situations where a Member State, by amending an existing aid scheme, creates new unlawful aid (Articles 1 (c) and (f) of the Procedural Regulation).

### **3 BRIEF SUMMARY OF COMMENTS RECEIVED TO THE OPENING OF PROCEDURE**

13. The third party claims that the incentive effect principle would be respected because the works started after having introduced the first application for aid, notwithstanding the fact that such aid application was introduced on the basis of another existing scheme.
14. The Italian authorities make reference to the implementing regulation (Decree n. 285/99) that considers, as eligible costs, the expenses incurred after the date of entry into force of the law (thus after 05.04.1998). Hence the measure would have created a legitimate expectation in the beneficiaries.
15. In fact, in their submissions, the Italian authorities argue that the system for awarding aid foreseen under the Decree n. 285/99 (so-called “*a sportello*” “first come, first served”) had lead possible beneficiaries to have legitimate expectations to be eligible for aid even in situations where the projects had already started.
16. The Italian authorities point out that the concrete implementation of the scheme, after the entry into force of the “*deliberazioni*” n. 33/4 and 33/6 of 27.7.2000, required for the first time the use of the “*bando*” procedure; therefore moving from a “*a sportello*” procedure to a “*a bando*” procedure induced the regional administration to include a clause in the implementing regulation requiring that the applications for aid presented before the publication of the first ‘*bando*’ had to be reintroduced using the prescribed forms. The regional administration, in this context, has accepted applications for aid even for projects already started.
17. In end, the Italian authorities emphasise that “*deliberazione*” n. 33/4, which was green-lighted by the Commission services, foresees that “the measures under Art. 9 of the regional law n. 9/98 have to be implemented in compliance with the “*de minimis*” rules”.

### **4 ASSESSMENT**

18. The Guidelines on national regional aid<sup>6</sup> require that aid schemes lay down that an application for aid must be submitted before work is started on the projects (point 4.2).

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<sup>5</sup> Council Regulation n. 659/99 laying down detailed rules for the application of Article 93 EC [now Art. 88], OJ L 83, 27.3.1999

<sup>6</sup> OJ 10.3.98, C 74.

19. This obligation is also contained in the Commission decision of 1998<sup>7</sup>, raising no objections to the regional aid scheme in favour of the hotel industry in Italy - Regione Sardegna (N272/1998). The Commission decision indicates that the beneficiaries must have filed an application for the aid, before work on the project has started.
20. The Italian authorities explicitly confirmed<sup>8</sup> that this obligation was fulfilled, in the context of the appropriate measures' exercise that followed to the entry into force of the Guidelines on national regional aid.
21. However, with the administrative decision n. 33/6, the Italian authorities allowed the award of aid to investments projects started before the date of application for the aid. In this respect, the Italian authorities appear not to have complied with the terms of the Commission decision approving the aid scheme, nor with the requisites set in the Guidelines on regional aid.
22. As a consequence, the Commission considers that the incentive effect of the aid might be undermined, due to the lack of an application for the aid before work on the project is actually started.
23. Such aid, granted outside of any existing aid scheme, and without prior notification to the Commission, should have to be considered as unlawful aid within the meaning of Article 1(f) of the Regulation n. 659/99.
24. Furthermore, in the absence of any incentive effect, such aid should be considered as operating aid which serves only to relieve companies of their normal business costs. In accordance with point 4.15 of the regional aid guidelines, this type of aid is normally prohibited. Exceptionally, however, it may be granted in regions eligible for the derogation under Article 87(3)(a), which is currently the case of Sardinia, provided that (i) it is justified in terms of its contribution to regional development and its nature, and (ii) its level is proportionate to the handicaps it seeks to alleviate. However, at this stage of the procedure, the Italian authorities have failed to demonstrate the existence of any such handicaps or to gauge their importance.
25. Concerning the comments received the Commission considers, at this stage, that:
  - (a) It is not possible to transfer the incentive effect from one scheme to another. The parameters of each scheme being different, the incentive effect is linked to one scheme in particular and, thus, the choices for the undertakings in applying one scheme or another cannot be accepted as a sound reason that gives to the beneficiaries the right to claim for having respected the incentive effect principle.
  - (b) The Commission approved the provisions of art. 9 of the regional law n. 9/98 that state that can be accepted as eligible expenses costs already sustained, but merely in compliance with the "de minimis" rules. However, in order to

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<sup>7</sup> The Commission decision has been communicated to the Italian authorities by letter dated 12.11.98, SG(98) D/9547.

<sup>8</sup> By letter dated 25.4.2001 n.5368 (registered as A/33473). In that context, the Commission invited Italy to accept the appropriate measures pursuant to Article 88(1) of the Treaty and to make the scheme compatible with the Guidelines. Replying to this exercise of appropriate measure, Italy submitted only "deliberazione n. 33/4" and not "deliberazione n. 33/6". On the basis of the information submitted by the Italian authorities, the Commission acknowledged that Italy accepted the proposal of appropriate measures and that the scheme was compatible with the Guidelines on national regional aid.

identify the costs falling under the “de minimis” rules, Italy proceeded splitting the projects, thus distinguishing the eligible expenses incurred before the application for aid from the ones incurred after the application for aid was presented. In case the costs incurred before the application for aid are below the “de minimis” threshold, Italy claims the compliance with the “de minimis” rules. As already recalled, point 4.2 of the Regional Guidelines requires that an application for aid must be submitted before work is started *on the project*. It follows that it is not possible to consider as eligible the expenses incurred after the aid application if the project, considered in its entirety, has started earlier.

26. Accordingly, at this stage of the procedure the Commission doubts that the aid can be considered compatible with the common market.

## 5 CONCLUSION

27. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests Italy to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. In particular, the Commission requests Italy to justify why “deliberazione n. 33/6” was not submitted to the Commission together with “deliberazione 33/4”. It requests your authorities to forward immediately a copy of this letter to the potential recipients of the aid.
28. The Commission wishes to remind Italy that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
29. The Commission warns Italy that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
30. If this letter contains confidential information, which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids](http://europa.eu.int/comm/secretariat_general/sgb/state_aids) Your request should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
Directorate for State Aid I  
State Aid Greffe  
B-1049 BRUXELLES  
Fax n°: 00/32 2 296.12.42

Yours faithfully,  
For the Commission

Neelie Kroes  
Member of the Commission